

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: VALSARTAN PRODUCTS
LIABILITY LITIGATION

CIVIL ACTION NUMBER:
1:19-md-02875-RBK-JS

STATUS CONFERENCE AND
ORAL ARGUMENT ON THE TAR
DISPUTE INVOLVING TEVA AND
PLAINTIFFS (Via telephone)

Wednesday, July 15, 2020
Commencing at 4:00 p.m.

B E F O R E:

THE HONORABLE JOEL SCHNEIDER,
UNITED STATES MAGISTRATE JUDGE

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1 (ALL PARTIES VIA TELEPHONE JULY 15, 2020, 4:00 P.M.)

2 THE COURT: We're on the record, Valsartan MDL,
3 Docket No. 19-2875. Why don't we get the names of lead
4 counsel for the plaintiffs and the defendants, and whoever
5 else intends to talk today, put your name on the record and
6 just like the other calls we've had, if you could just state
7 your name before you speak, so the court reporter knows who's
8 speaking.

9 Let's start with the plaintiffs.

10 MR. SLATER: Hello, Your Honor, Adam Slater for
11 plaintiffs.

12 MR. HONIK: Good afternoon, Your Honor, Ruben Honik
13 for plaintiffs.

14 MR. NIGH: Good afternoon, Your Honor, Daniel Nigh
15 for plaintiffs.

16 MS. WHITELEY: Good afternoon, Your Honor, Conlee
17 Whiteley for plaintiffs.

18 MR. STANOCH: Good afternoon, Your Honor, David
19 Stanoch for plaintiffs.

20 MR. PAREKH: Good afternoon, Your Honor, Behram
21 Parekh for plaintiffs.

22 THE COURT: And defendants.

23 MR. GOLDBERG: Good afternoon, Your Honor, this is
24 Seth Goldberg for the ZHP parties and the defendants.

25 MS. LOCKARD: Hi, Your Honor, it's Victoria Lockard,

1 and I have Jeffrey Greene from Greenberg Traurig here on
2 behalf of the Teva defendants.

3 MR. TRISCHLER: Good afternoon, Your Honor, Clem
4 Trischler for the Mylan defendants.

5 MS. JOHNSTON: Good afternoon, Your Honor, Sarah
6 Johnston for the retailer defendants and CVS.

7 MR. GEOPPINGER: Good afternoon, Your Honor, Jeff
8 Geoppinger, G-E-O-P-P-I-N-G-E-R, for the wholesaler defendants
9 and AmerisourceBergen.

10 THE COURT: The Court received the parties' letters
11 including the letter sent late last night regarding the Teva
12 issue. I'd like to save that issue for last, if you don't
13 mind.

14 Mr. Slater identified two issues in his letter: The
15 Teva issue and the status of the document production and the
16 request for additional time from the, quote unquote,
17 downstream defendants. Let's deal with that issue first, the
18 request for extension of time.

19 I would just like to hear if plaintiffs have any
20 position on that. I read your letter, I know you respect what
21 the Court said at the last conference.

22 Is there anything you want to add? The downstream
23 defendants have proposed that they do a rolling production
24 August 14, September 14 completed, October 13.

25 Apart from what the Court said at the last

1 conference, do the plaintiffs have any strong objection to the
2 request?

3 MR. STANOCH: Good afternoon, Your Honor, David
4 Stanoch for the plaintiffs. Other than Your Honor addressing
5 the request for the extension at the macro -- at the end of
6 the macro issue briefing and denying that request, you know,
7 the only other thing we would add, Your Honor, is that with
8 respect to the retail pharmacy defendant, that the great
9 amount of the documents and data requested and then issued
10 here were agreed to way back in March when the parties were
11 about -- when we were about to submit our macro issue briefing
12 to Your Honor.

13 There were only two issues with the retailer pharmacy
14 defendants, which was, one, how much the retailers paid to buy
15 the drug, and No. 2, what the PPP paid when it was dispensed
16 by the retailers. That's it. All the other data points they
17 knew about and they had agreed to produce.

18 So, it would be, you know, our position that whether
19 or not these defendants intended to do rolling productions
20 during the macro issue briefing or not or whether they want to
21 wait for the macro issue briefing was resolved, they certainly
22 were on notice for months about the exact things they need to
23 be start pulling and producing and could have been preparing
24 that this whole time.

25 THE COURT: Okay. Defendant, let me take the wind

1 out of your sails. The Court is going to grant your request
2 for an extension, but I just want to make a comment or two
3 about what happened here. The only way -- you know this, from
4 this and other cases, the only way that this case can
5 efficiently proceed and manage is if the parties cooperate
6 with each other, and if a group of defendants takes the
7 position that they're not going to produce sample documents,
8 so they're not going to produce exemplar documents and they're
9 going to wait weeks or months until the Court rules on a
10 bigger issue to produce a single piece of paper, you put the
11 Court in a very, very difficult position to grant request for
12 extensions of time.

13 If the parties work together and they cooperate and
14 they meet and confer and they say to the Court, Judge, we've
15 been working together but we have this tough issue and, you
16 know, we need this time to respond and we've been working
17 cooperatively, trying to move this litigation forward, that
18 makes it so much easier for the Court, because then the Court
19 can say, okay, the parties are acting reasonably and in good
20 faith and if they make a legitimate request for more time,
21 they get it.

22 So on a going-forward basis, what the Court would
23 really like to see, and I don't want to argue, like, in my
24 view, it's static because I know parties are going to deny it
25 happened, but I really would like to see the parties to

1 continue to meet and confer in good faith, cooperate with each
2 other and I am not a judge who thinks that every single
3 discovery dispute has to be worked out if the parties meet and
4 confer.

5 I understand how reasonable minds can disagree in
6 good faith on different issues, just like the TAR issue,
7 that's fine, but I would like to see the parties work
8 cooperatively towards that goal and in all frankness and in
9 all candor, I don't understand, if it happened, why groups of
10 defendants or defendants were steadfast in their refusal to
11 produce obviously relevant, plainly discoverable, sample
12 exemplar documents that will help advance the ball in the
13 litigation.

14 So that's all I have to say. We gave the defendants
15 way back when what they wanted until November to produce their
16 documents. We're going to hold their feet to the fire. The
17 downstream defendants want this 90-day extension until
18 October. They're going to get it. The order is going to
19 require rolling productions, and let's just move on and focus
20 on the merits of the case. Okay?

21 MS. JOHNSTON: Your Honor, this is Sarah Johnston for
22 the retailer defendants. Can I just clarify a few things for
23 just a moment? I promise not to take up too much time.

24 At first, you know, I take to heart what the Court is
25 saying and certainly agree that cooperation on both sides is

1 key to getting this case moving forward, and I think that we
2 previewed that in our submission to the Court yesterday that
3 that is certainly what we're trying to do here.

4 I also would like to just clarify that this is, as to
5 the retailer defendants, this is a situation where this is a
6 group of defendants that sat back and waited to collect
7 documents and then were waiting to push the ball forward on
8 the discovery process until after the macro hearing.

9 But with respect to the Court's frustration on the
10 exemplar issue, I just wanted to clarify for plaintiffs and
11 the Court that again, this is not something that we understood
12 to be an issue that affects the retailers because of the
13 nature of the discovery that we negotiated with plaintiffs,
14 the issue of exemplars was something that was not teed up as a
15 necessary issue.

16 So I want to be clear that as to the retailers, we
17 felt like we were working with plaintiffs and going along with
18 what the Court had, in fact, told the parties as important and
19 with respect to the specific request for an extension that the
20 documents that we've been working to correct fall into really
21 two big categories. There are the ones that are generally
22 capable of being pulled and collected and reviewed and
23 produced in much simpler fashion and then there are those that
24 take a lot of work, a lot of costly and complicated efforts to
25 collect, and then do all the non nightly processing and other

1 things we outlined in our letter, and we've been very clear
2 with plaintiffs all along that that was going to take some
3 time.

4 And related to that, those very difficult to collect
5 types of documents that were -- that we outlined that would
6 need to be fully vetted by the clients and processed in a
7 significant and expensive manner were dependent on the Court's
8 rulings on macro discovery. So we found ourself in a position
9 where we could either guess what the Court was going to -- how
10 the Court was going to rule, or we could run the various kinds
11 of searches on it, on a contingency basis, where we were
12 running them three or four times before macro rulings.

13 And so I just want to make sure that it's clear to
14 the Court and to plaintiffs that we are very interested in
15 continuing to work cooperatively and will continue to do so.

16 The extension is truly tied to some of these
17 documents that could not have been collected prior to the
18 hearing on macro discovery, and I think that the proposal
19 we've outlined is fair and makes sense and will continue to
20 keep the ball moving and we appreciate the Court's
21 consideration in granting the extension.

22 MR. GEOPPINGER: Your Honor, if I may, Jeff
23 Geoppinger for the wholesalers. I echo Ms. Johnston's comment
24 and also commit that we will continue to work and meet and
25 confer and move the ball forward.

1 I just wanted to clarify for the wholesalers that the
2 schedule that you'll be entering will be applicable to all
3 downstream defendants, retailers and wholesalers.

4 THE COURT: Yes.

5 MR. GEOPPINGER: Thank you.

6 THE COURT: Again, I want to save the TAR issue for
7 last.

8 Mr. Slater, you had raised an issue about the status
9 of production. Was there something you wanted to address?

10 MR. SLATER: Adam Slater for the plaintiffs, Your
11 Honor. I just thought it was -- we, as the plaintiffs,
12 thought it was a good idea just because the productions are
13 supposed to begin today to just have a check-in to make sure
14 that the productions were actually coming out to get some sort
15 of an idea that the prioritization is being fulfilled, if the
16 defendants can give some idea of what we can expect to be
17 getting now in this first shot because there was some very,
18 you know, specific orders about what should be produced, and
19 we would expect really a significant percentage of what needs
20 to be produced to be coming.

21 So we were hoping to get some sort of a report to the
22 Court and to us to give us some comfort that, yes, they're
23 following through, yes. I would think just for the Court's
24 benefit to have that update and then, you know, we would go
25 forward from there.

1 MR. STANOCH: Your Honor, this is David Stanoch for
2 plaintiff. I hate to interject and go a half step backwards,
3 and it's probably water under the bridge with the extension,
4 Judge, but, you know, if the extension is for the retailers
5 and the wholesalers, that's fine, I was just surprised to hear
6 Mr. Geoppinger say that because he never came to us saying
7 that they wanted an extension, and Mr. Goldberg's leave on
8 counsel letter exclusively talked on behalf of the retailers
9 and the burden about HIPAA concerns and anonymizing patient
10 consumer data up to the point of dispensement. That's
11 something the wholesalers don't have.

12 So, it is what it is and if that's the Court's
13 ruling, we'll of course abide by it and we'll continue to work
14 with both sets of them. I just want to put that on the record
15 that the wholesalers were not part of the request either to us
16 or in the letter to Your Honor.

17 THE COURT: Okay. I don't think there's anything
18 else to be said on the extension issue. Frankly, rightly or
19 wrongly, the Court understood that the request was being made
20 on behalf of both groups, and if I was wrong about that, so be
21 it, but I do think -- I don't think that plaintiffs are going
22 to be prejudiced by this and there is some symmetry to it, so
23 let's move forward.

24 But I think Mr. Slater's idea about getting a
25 check-in on if everything is in place for the production today

1 and what plaintiffs can expect, and is there an issue about
2 prioritization, makes sense.

3 So why don't we start with ZHP and then go through
4 all of the manufacturer defendants.

5 MR. GOLDBERG: Thank you, Your Honor, this is Seth
6 Goldberg for ZHP. I just want to clarify for the Court, you
7 may recall that the text order that Your Honor entered,
8 No. 416, required that for the production today, it would be
9 comprised of documents that were in the possession of
10 defendants' attorneys for ESI Consultants at the time Your
11 Honor entered that order, and that defendants used reasonable
12 good faith efforts to produce those documents by July 15th or
13 to begin to produce those documents by July 15th, and, for
14 that -- that's what's due today, that's what the order says
15 about production today.

16 And at least for ZHP's part, we were not in position
17 to produce -- we had not collected that kind of information
18 and did not have a production due today, but are nonetheless
19 going to be producing documents today.

20 You may recall this order was entered before ZHP had
21 begun to collect information because of the COVID issues. But
22 notwithstanding that, ZHP has assembled documents to be
23 produced today and we'll be doing so.

24 THE COURT: Let's go through all the defendants.

25 MS. LOCKARD: Your Honor, it's Victoria Lockard. I'm

1 happy to speak on behalf of the Teva defendants. We are also
2 making a substantial production today currently being prepared
3 with a focus on the items that have been prioritized by
4 request by the plaintiffs and that includes the noncustodial
5 production for the categories that were identified in
6 plaintiffs' letter and a custodial production from the
7 priority custodians who were identified in plaintiffs' letter.

8 And this includes again, you know, our good faith
9 effort to produce what was in our ESI vendor's possession, as
10 well as some additional items that we endeavor to collect in
11 the noncustodial pool.

12 We, you know, will save the TAR issue for the end of
13 the call, as you requested, but I want to confirm for the
14 Court that that has in no way slowed down our efforts and it
15 has facilitated our ability to produce the documents by
16 today's deadline. So, we will get into the specifics of that
17 at the end of the call.

18 THE COURT: Can I go back a step, because maybe I'm
19 wrong about this, but the Court's order that Mr. Goldberg
20 cited to, Docket No. 416 entered on April 20th, 2020, says:
21 "These defendants shall commence the rolling production of the
22 documents required to be produced in Document No. 328, by no
23 later than July 15, 2020."

24 And if you go back to 328, 328 is the order that
25 approved the document request, and I think that an original

1 production date of whatever it was, March 1.

2 So, Mr. Goldberg, where's the limitation that you
3 discussed derived from?

4 MR. GOLDBERG: So, Your Honor, I -- if Your Honor
5 goes further into the order that you referred to, it starts
6 with the next sentence: "The defendants shall use reasonable
7 good faith efforts to comply with plaintiffs' prioritization
8 and to the extent responsive documents are currently in the
9 possession of defendants' attorneys or ESI Consultants,
10 defendants shall use reasonable good faith efforts to produce
11 the documents by July 15th, 2020."

12 Your Honor may recall that at the time this order was
13 entered in the case management conference we had that preceded
14 this order, we had raised with the Court -- we had a very
15 lengthy discussion with the Court about the difficulties that
16 different parties were having with respect to collecting and
17 producing documents in light of COVID-19, which, you know,
18 April of 2020 is when it really was presenting a problem and
19 resulted in this new schedule, and there was discussion on the
20 record about the fact that some defendants had not begun to
21 collect documents by the time of that case management
22 conference, ZHP in particular, because of the timing of
23 COVID-19, and that's what led to this sentence about this
24 No. 5 in the order about -- to the extent responsive documents
25 are currently in the possession of defendants' attorneys

1 whereas -- ESI Consultants, then reasonable good faith efforts
2 to produce those documents should be made. And --

3 THE COURT: I got it, Mr. Goldberg. Thanks for
4 clarifying it for me. Thank you very much.

5 So we heard from ZHP and we heard from Teva. The
6 other defendants, who are they? Aurobindo, Hetero, I think
7 there's one more.

8 MR. TRISCHLER: Your Honor, Clem Trischler. Mylan is
9 the other one, I believe.

10 THE COURT: Oh, Mylan, how could I forget Mylan.

11 MR. TRISCHLER: Which is my client. I wish you
12 would.

13 (Laughter.)

14 THE COURT: Not me, Mr. Trischler. The plaintiff,
15 you want plaintiffs to forget Mylan.

16 MR. TRISCHLER: I understand and I concur.

17 THE COURT: So where does Mylan's production stand?

18 MR. TRISCHLER: Well, Your Honor, Mylan is making the
19 first of its rolling productions today, much like does ZHP and
20 Teva, we attempted to consider in good faith the plaintiffs'
21 prioritization schedule. I believe when plaintiffs have an
22 opportunity to go through the production, they'll see that we
23 produced a number of materials that are on the prioritization
24 schedule. I don't pretend to have it all committed to memory,
25 but I believe some of the things that were asked for were

1 things like quality supplier agreements, certificates of
2 analysis for the API, Valsartan finished dose testing
3 information, SOPs. All those things are included in today's
4 production.

5 Obviously, there's still other materials to come. I
6 would not suggest or represent that everything on the
7 plaintiffs' prioritization schedule or everything on the
8 request for production of documents is being provided today,
9 but I certainly believe we've made a good faith initial
10 production of a multitude of items that were on the
11 plaintiffs' priority list and we're working diligently to
12 complete the production and I don't see any reason why we
13 would not be able to do so on a continual rolling basis by the
14 end of November.

15 THE COURT: Okay. Terrific.

16 Are there any other defendants who are subject to the
17 order requiring a rolling production today? We did ZHP, Teva
18 and Mylan. Is that it?

19 MS. HEINZ: Hi, Your Honor, this is Jessica Heinz for
20 the Aurobindo defendants. We will also be making a production
21 today. It is based on the plaintiffs' prioritization letter
22 as well, and it's also going to be an additional -- or a
23 supplemental core discovery production on behalf of all of the
24 Aurobindo defendants as well.

25 THE COURT: Terrific.

1 Hetero, are you on the phone, Hetero's counsel?

2 MR. SHAH: Yes, Your Honor, good afternoon. This is
3 Nakul Shah on behalf of the Hetero entities; Hetero Drugs and
4 Hetero Labs.

5 Your Honor, we're preparing and finalizing our first
6 ESI document production two weeks in to plaintiffs by the end
7 of the day today and we've also made a good faith effort to
8 keep in mind the plaintiffs' prioritization schedule. We
9 additionally completed our core discovery productions, I
10 believe it was this morning.

11 THE COURT: Terrific.

12 Okay. So now we have a status, Mr. Slater.

13 Are there any other issues that anybody wants to
14 address before we get to the TAR issue?

15 Okay. I had one question before we get there. Are
16 we going to finalize all the fact sheets to be entered by the
17 end of the month?

18 MR. SLATER: There's an order that we are, so we are.

19 THE COURT: Okay. As I see things, and correct me if
20 I'm wrong, once we get those fact sheets entered, I could be
21 wrong about this, but the case will be in a little bit of a
22 hiatus while the defendants produce their documents, while the
23 plaintiffs finish their fact sheets and maybe, maybe not,
24 we'll talk about that at the end of this call. Maybe we don't
25 need the mid-August call next month. We could have it at the

1 end of the month. But I just foresee, you know, you've been
2 working hard after we picked up after the COVID lapse, the
3 last month or two or three. The next few months is going to
4 be focusing on the document and ESI production, issues come up
5 like they always do, but probably come September, it's time to
6 start thinking about the next phase of the case, you know,
7 getting the 30(b)(6) deposition notices cleaned up and dealing
8 with those objections which are invariably going to come.

9 So I'm talking about who is going to be deposed, how
10 many depositions, where they're going to be taken, et cetera, et
11 cetera.

12 So I think we're in pretty good shape through the
13 fall, and I anticipate, like I said, we may start depositions
14 December/January of the defendants. They could start earlier
15 if the plaintiffs want to. I guess we could talk to the
16 defendants about when they want to start taking plaintiffs'
17 depositions since they'll likely have the information they
18 need to take those depositions sooner rather than later.

19 So the long and short of that is, I think we're in
20 pretty good shape.

21 Let's get to this TAR issue. I read the papers. I
22 don't think it's appropriate for the Court to make a ruling on
23 the TAR issue today because at least plaintiff ought to see
24 what the production is that Teva is making, and then I know I
25 had a few questions that I'd like to address with Teva about

1 this TAR review and I anticipate -- since this issue only came
2 up very recently, that there might be continuing discussions
3 amongst the parties that might result in a resolution of this
4 issue.

5 But one of the questions I had for Teva was: What's
6 the difference between TAR 1.0 and TAR 2.0?

7 MS. LOCKARD: And, Your Honor, I'm going to turn this
8 over to Jeff Greene from Greenberg who's our eDiscovery
9 counsel on this. So I think he's best suited to answer these
10 kind of questions.

11 MR. GREENE: Good afternoon, Your Honor, this is Jeff
12 Greene from Greenberg and a pleasure to be here before your
13 Court.

14 So the direct answer to your question is, TAR 1.0 was
15 more sort of affectionately known as predictive coding, and
16 the process associated with how the computer learns is really
17 what makes the difference between TAR 1.0 and TAR 2.0.

18 In TAR 1.0, there's a seed set training process and
19 basically what that training process is, is there are any
20 number of two to 400 documents in a seed set that are
21 reviewed, and the decisions with respect to the, you know,
22 review process are loaded into the -- into the black box, if
23 you will, into the computer system, and the computer then
24 looks at it and says, okay, we've generated assembling of 400
25 documents and there's a couple different ways you can train

1 the system. You can train it by loading documents in that we
2 already know are responsive and use that as a starting point,
3 or you can say, give us 400 random sample documents from a
4 variety of custodians and so on. Those documents are reviewed
5 and those are loaded into the system, and then what the
6 computer system does is say, okay, I'm going to give you
7 another 400 documents and those documents are reviewed, and
8 each time what you should expect to see is the computer get
9 smarter based on the decisions that are made by the reviewer.

10 So if the first set, for example, might only have
11 10 percent response to documents, first set of the first seed
12 set of 400. The next set might have 23 percent. Those seed
13 set reviews continue, and sometimes the system gets what I'll
14 call stability, very quickly. And what I mean by "stability"
15 is the reviewing seed sets, maybe you get to 75 percent or
16 even 85 percent that are responsive. And once you get that
17 system, what I'll call system stability, you've then sort of
18 reached the end of the exercise.

19 And in my experience, Your Honor, I've done dozens
20 and dozens of these things, sometimes it takes a relatively
21 small number of documents, three or 4,000. Sometimes it takes
22 20,000 documents or more to get stability. In other words,
23 that the system is generating -- the sets of documents that
24 the system is generating are consistently responsive, and, you
25 know, generating a high degree of recall and precision, which

1 basically means it's hitting on the document it should hit on,
2 these are the responsive documents, okay?

3 TAR 2.0, sometimes called Continuous Active Learning,
4 in our case it's CMML, is a little bit different. That
5 process is, we basically just start reviewing documents and
6 there are no seed sets to review, it's functionally we start
7 reviewing and we keep going and rather than getting -- trying
8 to get system stability, what we're looking for, what the
9 system is trying to do is rank the documents to give them a
10 score, if you will, with the most responsive documents being
11 scored 1.0 and the least responsive documents being scored 0.0
12 or 0.01.

13 And what that does, as the more documents are
14 trained, the system gets more intelligent, if you will, and,
15 you know, basically percolates to the top of the stack the
16 most responsive documents and it moves the nonresponsive
17 documents down to the bottom of the stack. And so there's a
18 ranking of zero to 1.0. Each document has a score.

19 And so what you do is with a CAL process or a TAR 2.0
20 process, is you continue to review documents and sometimes you
21 may review all the documents, but what CAL allows you to do is
22 prioritize the most responsive documents first.

23 What you can do, Your Honor, though, is CAL can also
24 allow you to look at documents and say, it's no longer
25 necessary to review documents because you keep reviewing

1 documents that are scored with a .2 or a .1 or maybe a .3 and
2 those documents absolutely aren't relevant. So we may go down
3 and review, you know, a hundred documents from that set and
4 not one of those documents is responsive, and so the CAL
5 system can say to you functionally, hey, look, we're not
6 seeing any more responsive documents in this batch, you know,
7 from here on.

8 You, counsel, can make the determination, if you so
9 choose, to stop at this point, from a statistically
10 significant perspective, you've reached, you know, you've
11 reached your goal of finding the responsive document.

12 So the main difference is how the systems are
13 trained, the difference is what the end result ultimately is,
14 and what CAL does is it says, it basically ranks the
15 documents. What predictive coding or TAR 1.0 is, basically it
16 says, we're going to give you a batch of documents that we're
17 sure because the system is stable, that we're sure are
18 responsive and everything else absolutely is not responsive or
19 looks nonresponsive.

20 CAL, you know, CAL is, I don't want to say it's new,
21 but TAR 2.0 coming out, you know, almost a decade ago and the
22 predictive algorithms behind it have been in place for
23 decades. But the original cases, the *DaSilva Moores*, the *Rio*
24 *Tintos*, all those cases from Judge Peck, those initially were
25 TAR 1.0 cases. But now we're seeing the prevalence of TAR 2.0

1 and it's a much more sophisticated technology. It learns the
2 lessons that, you know, from TAR 1.0 and allows us to
3 prioritize the documents and get them to plaintiffs -- into
4 plaintiffs' hands faster, quite frankly.

5 THE COURT: Let me ask you a question.

6 MR. GREENE: Sure.

7 THE COURT: This is hypothetical, of course.
8 Hypothetically, let's say Teva has a thousand documents to
9 review. The search terms that the Court ordered, they run
10 those search terms. 500 documents are hit by those search
11 terms. Does this TAR program review the 500 documents or the
12 thousand documents?

13 MR. GREENE: It can be done either way, Your Honor.
14 Our approach --

15 THE COURT: What's Teva doing?

16 MR. GREENE: Our approach would be to layer the CMML
17 algorithms across the documents that hit on the search terms.

18 THE COURT: Correct.

19 MR. GREENE: But it can be done either way.

20 THE COURT: All right. This is an important point
21 for today's purposes.

22 For today's purposes, okay, the production that Teva
23 is making today, as I understand it, these were the documents
24 that were the highest priority that came up in this program
25 that -- in other words, Teva has not yet gotten to the point

1 where it says, every document scoring below X that has a hit,
2 we're not going to review. Am I right about that, that
3 decision hasn't been made yet?

4 MR. GREENE: Yes, Your Honor, you're correct.

5 THE COURT: All right. So when do you anticipate
6 that Teva is going to get to the point, because it seems to me
7 that's what plaintiffs' biggest concern is, that how is the
8 decision going to be made that a document that hasn't hit is,
9 quote unquote, not responsive? In other words, irrelevant,
10 right?

11 MR. GREENE: Correct. Well, so obviously, Your
12 Honor, we're doing a rolling production and I think the -- you
13 know, with respect to the priority custodians, we should know
14 that in the not too distant future, within a week or two at
15 most with respect to the priority custodian.

16 The suggestion I have, Your Honor, is that -- you
17 know, and we truly take this in the spirit of the cooperation
18 from Sedona and all those cases that say you have to
19 cooperate. I think, you know, what you saw from the
20 submissions is that, you know, the parties tried to meet and
21 confer and it didn't really go anywhere. I think there's
22 obviously some, you know, concern amongst plaintiffs about the
23 use of CMML and the use of CMML to, you know, to narrow the
24 scope of what documents need to be reviewed.

25 We have, from our perspective, Teva has complied with

1 the terms of the ESI protocol and, you know, we've not yet
2 reached the decision, and I will be frank with Your Honor, I
3 do expect us to get to that point where we -- we'll leverage
4 the Teva -- the CMML decisions to restrict or to eliminate
5 certain documents review population.

6 My suggestion to Your Honor is in the spirit of
7 cooperation that you were talking about is, if there are
8 concerns about the, you know, the validation, if you will,
9 associated with restricting the number of documents to be
10 reviewed or limiting the dataset to be reviewed, my suggestion
11 is that, you know, let's engage in a reasonable meet and
12 confer process, a productive one where the parties, and this
13 should not necessarily be limited to Teva, but if there are
14 other defendants who intend to use our or some sort of
15 predictive coding or some sort of CAL or CMML exercise, we all
16 get together and we negotiate a protocol for the use of
17 technology and which would include the validation concepts
18 that I think plaintiffs are most concerned about.

19 Because at the end of the day, their concern that,
20 hey, there's this huge batch of documents that are going to be
21 pushed to the side and, you know, and not -- and not reviewed.
22 I think the validation concepts that, you know, if you look at
23 some of the decisional case law that's out there, and I'm
24 speaking specifically of the In Re: *Broiler Chicken* antitrust
25 litigation which is in the eastern -- the Northern District of

1 Illinois, that gave us a really good idea of what a validation
2 protocol could look like. And I think if the parties were
3 reasonable, and rather than just saying, no, you can't use
4 CMML, we sat down and I would say cooler heads prevailed, we
5 could say, let's negotiate a reasonable protocol for the use
6 of TAR or CMML and for -- that includes a validation process
7 to allay any concerns that plaintiffs may have about documents
8 that don't actually get reviewed at the end of the day, in
9 other words, limiting the dataset which is required under the
10 ESI protocol.

11 And, you know --

12 THE COURT: Let me see if I understand -- I think I
13 understand what you're saying and I just have a couple more
14 questions, then we'll hear from plaintiffs. But I think what
15 you're saying is, Judge, we haven't yet reached the point
16 where we're not going to review documents for which there's a
17 hit. Eventually, we're going to get to that point, Judge, and
18 we're agreeing to meet and confer with the plaintiff to see if
19 we can agree on some type of validation or process, what have
20 you, that would trigger the ability of Teva not to review
21 every document where there's a hit.

22 MR. GREENE: Your Honor, I couldn't have said it
23 better myself.

24 THE COURT: Well, yes, you could have.

25 (Laughter.)

1 MR. GREENE: Your Honor, the only caveat to that
2 would be not necessarily just Teva, but if there are other
3 defendants who are considering using this technology, let's
4 get their input too.

5 THE COURT: Okay. One more question, or one to two
6 more questions. Take TAR out of it. Suppose you --
7 apparently, there's people who aren't using TAR or companies
8 that aren't using TAR, or go back a few years. There's a
9 million documents to review. There's 200,000 hits. If you're
10 not using TAR, does each one of those 200,000 documents get
11 reviewed to determine if it's relevant to the case by hand?

12 MR. GREENE: So the answer to that question would be
13 yes, and that's just because of the nature of the -- of a
14 brute force linear review, it has to be. I mean, it would
15 be -- I'm not sure how we as attorneys could uphold our
16 obligation to the Court by not reviewing every document. If
17 you were not using CMML or CAL, if you were not using
18 technology, you would have to do that, and, you know, the
19 sophistication of the algorithms in connection with, you know,
20 these systems allow us to do that.

21 They allow us to prioritize the documents that
22 plaintiffs have asked for, and, you know, these systems are
23 inherently flexible so that we can, you know, if we need to
24 make training on the fly so as to account for two documents
25 that enter the work stream, we can do that.

1 A linear brute force review, Your Honor, and not only
2 being less accurate, and this is well-documented by any of the
3 reports written by Maura Grossman and any of the studies that
4 are out there from the Georgia Institute and so on --
5 Georgetown, you know, linear review is well-documented to be
6 far less reliable than technology-assisted review.

7 So what we're getting -- what I'm getting at, and
8 I'll try and keep it short is, we're able to produce the most
9 -- you know, the most responsive documents at the earliest
10 stage of discovery to plaintiffs and it's a more reliable
11 dataset than, quite frankly, than using a linear review.

12 And so where our position is, this should benefit
13 plaintiffs. And, you know, we're a little perplexed as to why
14 they object to this because there's any number of cases where
15 plaintiffs have tried to foist TAR onto opposing parties and
16 it is black letter law, Your Honor, that -- and I'm sure you
17 know that, you know, the responding party is in the best
18 position to choose the review and production methodology, and
19 that's not what we're trying to do here.

20 So to answer your question, I think you would have to
21 go through every one of those 200,000 documents, but that's
22 just the nature of the beast with linear review.

23 THE COURT: Does TAR also do a privilege review?

24 MR. GREENE: TAR does not do a privilege review in
25 sort of the traditional sense. What we would do in that case,

1 Your Honor, and what we're doing here is, we would run what I
2 will call a privilege screen across documents and that
3 privilege screen would say, for example, find all documents
4 that say Jeffrey Greene and Victoria Lockard and so on, and it
5 would pull those documents out and park them somewhere. Those
6 documents would then be reviewed. So attorneys' eyes do go on
7 those documents for sure, because we do have to make a -- we
8 do have to make a true privilege call and actually prepare a
9 privilege log.

10 So if there was a document that, you know, said, you
11 know, that had the words "Jeff" and "Green" in it, Green
12 without an e, as opposed to my name Greene with an e, the
13 system might see that and say, hey, this document looks
14 privileged, but when we put attorneys' eyes on it, it proves
15 not to be privileged. So TAR would not exclude or this
16 technology that we're using would not be used to exclude
17 privileged documents. We would use a filter for that, but
18 then attorneys' eyes would be on every document.

19 THE COURT: One more question. Go back to my
20 hypothetical. My hypothetical, 1,000 documents, 500 hits.
21 You do your TAR review and it determines which of those 500
22 are most responsive and it decides, we're going to take your
23 first 250. So to date, no one has put their hand on the
24 document, after it goes through the hit review, after it's at
25 the top of the priority list, is it then reviewed by someone

1 before it's produced or is it produced just based on what the
2 computer says?

3 MR. GREENE: So in -- and I'll be specific in the
4 case. So we're making a production today, Your Honor, I think
5 it's around 70,000 pages and something like 12,000 documents,
6 and every single one of those -- attorneys' eyes have been on
7 every single one of those 12,000 documents. We've not done
8 any, you know, cutoff on the way up either, which is to say,
9 hey, we're going to say everything above a score of .5 is
10 responsive and, therefore, we're going to turn that over.

11 We're looking at this because frankly, Your Honor, we
12 don't want to produce -- the system may -- could be wrong in a
13 score, although it's usually not, but, you know, if there's a
14 document, for example, that the system scored highly, but it
15 actually has no relevance or responsive to the case, you know,
16 we would lay attorneys' eyes on that and, you know, we may
17 make a decision in rare circumstances to say, no, that's not a
18 responsive document. The system learns from that. We do take
19 that document out, but every single document we're producing
20 today has been reviewed.

21 THE COURT: What happens ten months from now when the
22 system is up and running, it's been validated, test runs,
23 whatever you do, and then you hit a certain number and it's
24 nonresponsive, above a certain number, it's responsive. Are
25 the responsive documents reviewed by a live person before

1 they're produced?

2 MR. GREENE: The answer to that would be yes,
3 although I'll qualify it by saying, you know, in general, Your
4 Honor, they don't have to be, but in our case, I would say
5 they will be.

6 THE COURT: Why?

7 MR. GREENE: To ensure two things, really, or maybe
8 three things. To ensure there's no information in there that,
9 for example, doesn't relate to other products, that would be
10 one, you know, trade secret proprietary information that, you
11 know, we need to be obviously concerned about. We also would
12 look at it in terms of if a document, for whatever reason,
13 missed a privilege filter, that, you know, it -- words that
14 just didn't -- weren't in our privilege screen, want to review
15 that document as well, and then the fourth, Your Honor, is we
16 don't want to produce nonresponsive documents, so we would be
17 reviewing those for those criteria.

18 THE COURT: All right.

19 MR. GREENE: Then the fifth probably, Your Honor, is
20 we want to know what documents we have in our case. We need
21 to look at the documents too.

22 THE COURT: I think we might have just hit the nail
23 on the head, okay? And I anticipate Mr. Slater is going to
24 jump all over this.

25 If you're so concerned that the documents that get a

1 high score have a legitimate high score and you're reviewing
2 those with a live person, if I was the plaintiff, I would say,
3 well, why don't you do the same for the nonresponsive
4 documents. Why don't you double-check them to make sure that
5 there's no responsive information on them that should be
6 produced, that you're checking the responsive documents to
7 double-check that they're responsive, but you're not checking
8 the nonresponsive documents to double-check that they're
9 nonresponsive, right?

10 MR. GREENE: Actually, Your Honor, that's not right,
11 and I apologize if I wasn't clear.

12 Earlier when I was talking about *DaSilva* being a TAR
13 protocol, I made the reference to a validation protocol and
14 what the validation protocol is, Your Honor, is -- it's that
15 very thing you just described, which is we do sampling
16 exercises of the nonresponsive documents by a human reviewer.
17 So we get sets of hundreds if not thousands of documents from
18 the nonresponsive batches. So documents that have been scored
19 lowly, right, if that's such a word, the documents that have
20 received low scores, we do a validation exercise, and this is
21 something that we would agree with plaintiffs on if, you know,
22 if we could negotiate in good faith with them, that we have a
23 process.

24 At the end of this exercise, that said, we will agree
25 to do the following: Review 500 documents here, 2,000

1 documents there, 2500 documents here in batches, and we will
2 share the results of those reviews in terms of metrics. So if
3 we review 5,000 documents and 50 of those documents prove to
4 be responsive, then, you know, that may drive two things. It
5 may drive a little bit more work in terms of making -- you
6 know, sharpening the algorithm to make sure we capture those
7 documents.

8 But that validation exercise at the end is a
9 absolutely critical process to prove what we did was right and
10 to prove that we were reasonable and defensible in our
11 approach.

12 So we would never, Your Honor, just say we're going
13 to stop somewhere and not look at those. We're going to look
14 to, you know, the sample of potentially thousands of
15 documents, but, you know, it can depend. And you look at
16 those samples and say, of these 5,000 documents or 500
17 documents or whatever it is, how much of it was actually, you
18 know, deemed responsive, and you can do those on a random
19 sample basis. There's any number of ways you can generate
20 those samples, whether it's by custodian, whether it's purely
21 randomly, but -- and there are a variety of different ways to
22 generate subsamples, but I think the way to approach this,
23 Your Honor, is, let's get an agreement on how to do a
24 validation protocol, which is not heavy lifting if everyone is
25 cooperating, and that will, you know, give plaintiffs and

1 defendants for sure the confidence that we've looked at the
2 responsive material, but we've also conducted a very
3 significant -- statistically significant sample of the
4 nonresponsive material to prove that we're right.

5 THE COURT: Okay. But I keep on saying last
6 question, and this is my last question. The validation
7 process that you're talking about for the nonresponsive
8 documents, are you doing that same or similar validation
9 analysis for the responsive documents, or are you reviewing
10 every single document that's produced?

11 So, in other words, you're double and triple-checking
12 to make sure documents are responsive, but with regard to the
13 nonresponsive documents, it's going to be a validation
14 process.

15 MR. GREENE: Not exactly.

16 THE COURT: And I'm guessing that's where plaintiffs'
17 concern is. I'm guessing. I don't know.

18 MR. GREENE: So one of the things about CAL is that
19 -- and this is an important thing to remember, is that it is a
20 continuous process, right? It's Continuously Active Learning,
21 and so, you know, we can discuss a validation process to be
22 used, I don't want to say at the end of this exercise, but
23 we've already done what are called allusion test samples of
24 the priority custodians, you know, that we're producing today.
25 And what that means, Your Honor, is it's a set of documents

1 and, you know, it's around a thousand documents, I believe,
2 and, you know, and this is for our own purposes, this is not
3 necessarily to prove anything to anyone but we want to make
4 sure we're right here.

5 So we reviewed 800 to a thousand documents from the
6 nonresponsive set for these priority -- for the priority
7 custodians that we're producing today, and of those, I think
8 it's 800 to be perfectly honest, I think of those 800
9 documents, all of 14 -- only 14 documents proved to be, you
10 know, responsive. In other words, 786 documents the system
11 got right, and we looked at every single one of those
12 documents, attorneys' eyes, and the system proved to be right
13 98, ninety -- almost 99 percent of the time. And so that
14 gives us great confidence.

15 So there's a validation protocol certainly at the end
16 of the process or, you know, whether we do it on a priority
17 basis, that can be discussed as well. But we're constantly
18 checking ourselves to ensure that, you know, the documents we
19 have are the right documents. So -- and, you know, we're
20 happy to provide those statistics to -- or those metrics to
21 plaintiffs and that would be part of a validation protocol,
22 which would be built into a larger TAR protocol. But at the
23 end of the day, I think, you know, the answer is, it's a
24 constant process of proving to ourselves, proving to the
25 Court, because that's obviously our obligation, and then

1 obviously proving to plaintiffs that we've met our obligation.
2 There's no doubt that this technology works. Courts all over
3 the country have adopted it and it can be used here.

4 And so, you know, for that reason, I think if you
5 give the opportunity, you know, the parties, say, hey, by July
6 30th, 31st, whatever it is, sit down, bash out any discovery
7 TAR protocol, come back to me in two weeks or in a month or
8 whatever it is, it's not going to slow us down. We're going
9 to keep reviewing, we're going to keep doing all the tests and
10 all the validations we'd be doing anyway. That's the logical
11 thing to do here.

12 And I don't want to tell the Court what to do, but if
13 I were to tell the Court what to do, that's how you play this
14 is, let's get together, cooperate, get everyone in a room or
15 Zoom and bash this out. It's not that difficult.

16 THE COURT: Mr. Slater, it's time for me to be quiet
17 and let you speak.

18 MR. SLATER: Thank you, Judge. And, you know,
19 fortunately through the Benicar years, you taught me to ignore
20 static, so I'm going to ignore static.

21 THE COURT: Yes. And I know you're going to --
22 please don't say that, why did they wait until July 1st to
23 tell us about this, because I know that's going to be a burr
24 in your saddle. It is what it is. We can't do anything about
25 it. So let's move forward and not backward, all right?

1 MR. SLATER: Yeah. No, let's move forward, Your
2 Honor. But everything that you've just heard you can pretty
3 much reject as having any relevance to this case at this
4 point. I'll tell you why. You know, Mr. Greene talks nicely
5 about CMMLs and TARs and all these things, and this would have
6 been a wonderful conversation to have a year ago, but the
7 idea -- and I'm going to take this word from -- remember, the
8 defense cited case law to us to justify what they're doing,
9 and we used those cases in the briefing we submitted to the
10 Court.

11 So I'm going to quote to those cases and I'm going to
12 talk about the law and I'm going to talk about the precedent
13 where defendants have tried exactly what they're trying to do
14 here and tell you about the mischief that's being perpetrated,
15 and it's insidious and it's a serious, serious problem that
16 I'm very concerned about.

17 So what the Judge talked about in the *Progressive*
18 *Casualty Insurance Company verses Delaney* case, where almost
19 this exact same scenario played out is that you don't get a
20 do-over. What the Judge did, he took a defendant who agreed
21 to a search term protocol, a protocol whereby manual search
22 terms as we have, one, Your Honor, ordered last year and then
23 to the consternation of the plaintiffs and the Court, the
24 defendants came back this spring and upended that and we then
25 had to spend months of negotiation and arguments with the

1 Court before we finally got to the point where the search
2 terms could be modified based on representations by every
3 defendant, including Teva, that the reason the search terms
4 needed to be modified was because they were pulling too many
5 documents, such that it was going to be unmanageable without
6 the search term modifications for them to manually review the
7 documents under the existing protocol that was agreed to and
8 in place in this litigation.

9 Understand, Your Honor, this TAR application is not
10 intended to be applied to a post-search term application of
11 documents. It's not being used the way it's intended to.
12 What they're doing, and I'll go through what they're doing,
13 because it is transparent and insidious.

14 What you're supposed to do with TAR is you're
15 supposed to take the entire document set and you're supposed
16 to have both sides come up with the definitions of the tags
17 that are going to be used to define a document as responsive
18 or not.

19 The first massive roadblock that we ran into when we
20 said, look, we'll at least talk to you even though we have
21 serious concerns about where you're driving this, and Your
22 Honor is exactly right, they're ultimately driving this to try
23 to block documents from getting to us. We said, let's talk
24 about the definition of responsiveness you're using, let's
25 talk through that and they would not tell us. They said that

1 is our own private privileged information, you, the
2 plaintiffs, don't get to know because we have complete control
3 over this process and we're only talking to you as a courtesy.

4 We tried to talk about how the technology was going
5 to be applied in terms of how you are going to recheck the
6 testing, and it wasn't just me on the phone, it was myself,
7 Mr. Parekh and Mr. Jaffe, our expert on this. They couldn't
8 get an answer to any of their questions either, how are we
9 going to have input into this process?

10 And the answer was, you're not going to, plaintiffs,
11 we're going to do this and we're going to do it and you're
12 going to be very happy that we did this for you is essentially
13 what the back and forth was.

14 Now, if you look at their own white papers, they talk
15 about the fact that this is an alternative to search terms,
16 not an adjunct.

17 What they're trying to do now is this: First, they
18 run the search terms, which we in good faith limited, we never
19 in 10 million years would have engaged in that negotiation and
20 those limited those search terms the way we did the last few
21 months if we were told, well, we're also intending to overlay
22 this with a TAR process that's going to end up with a
23 reservoir of documents that are going to be not reviewed. And
24 whatever systematic testing or whatever they say they're going
25 to do, there's no way this is for our benefit. The idea that

1 this is somehow for our benefit, that's laughable.

2 The only reason they're doing this, cause first what
3 they do is they take their entire document set and they narrow
4 it with the search terms, then they run their TAR, they
5 further narrow. Then for the documents, as Your Honor pointed
6 out in your questioning of counsel, that they find to be
7 producible and not privileged, they still review them and they
8 still will pull some of those documents out and not produce
9 them.

10 So they have three levels of review to try to narrow
11 what they give us and they want this blessed by the Court,
12 which we absolutely object to. We believe that this should be
13 rejected today, Your Honor.

14 And by the way, the fact that they ran this after we
15 objected. They told me on the telephone when I asked them if
16 you've done this yet, they told us no when we spoke to them on
17 the phone. The fact that they went ahead and did it, I
18 suppose the only issue is going to be the flow of production,
19 which is something I'll get to, maybe that even they've
20 upended to some extent how the documents would have flowed to
21 us otherwise. And by the way, 70,000 pages they're producing
22 today.

23 I want to go back, Your Honor, when we had put on
24 issue No. 1 and I was very quiet during that. When you got
25 these representations from the defendants that they're all

1 complying. Teva is producing 70,000 pages. Big deal. Your
2 Honor well knows 70,000 pages is a drop in the bucket. That's
3 nothing. And the other explanations you got are nothing.

4 And to digress for one moment, no other defendant has
5 ever raised the possibility of using TAR, ever. We've asked
6 about it, I have transcripts going back to November of 2019
7 when Mr. Goldberg said he would talk to us about it, we had
8 discussions and they all told us, we're not doing it. Because
9 if we knew they were going to do it back then, Your Honor, we
10 would have a meet and confer, that would have taken several
11 months, the Court would have managed it, we would have had
12 multiple lengthy meetings, we would have ended up in front of
13 the Court if there were disputes, which there likely would
14 have been in terms of our input and involvement, and it would
15 have been hammered out and it would have been in writing just
16 like the cases that we have submitted to Your Honor.

17 But that didn't happen because they never intended to
18 do it. When counsel just suggested to Your Honor, let's get
19 the other defendants on board, too, to start doing this also?
20 So now they're all going to redo the entire protocol and now
21 they're going to layer a new TAR protocol on top of search
22 terms, narrowed documents, which is completely improper under
23 their own white papers and their own methodologies. We
24 categorically reject that, object to it, et cetera.

25 Let's go back to the *Progressive Casualty Insurance*

1 case. They -- I'm looking at Page *9 because it's a Westlaw
2 citation. This is their case. The Court said: "Had the
3 parties worked with their eDiscovery consultants and agreed at
4 the onset of this case to a predictive coding based ESI
5 protocol, the Court would not hesitate to approve a
6 transparent, mutually agreed-upon ESI protocol."

7 However, this is not what happened, and then the
8 Court talks about the fact that the defendant *Progressive*
9 agreed to search the universe of documents using search terms.

10 Then the Court talked about the fact that the
11 proposal by that defendant *Progressive Insurance Company* was,
12 okay, we want to replace the manual review with the TAR
13 review. And the Court said, you don't get a do-over,
14 especially where your proposal lacked transparency, because
15 we've already been doing this, that Court said, for so long.

16 Well, Your Honor, we've been working this for almost
17 a year now, the search term methodology. We have broken our
18 backs and that includes the Court, broken our backs to try to
19 get a search term protocol in place based on false pretenses.
20 Because for them to now come up at this point in the game and
21 say, well, now, we want to layer this other methodology which
22 is not intended to be run on the narrowed set of hit
23 documents, the search terms, but is intended to be run on the
24 full document set would be completely contrary to the actual
25 literature from the application seller, this Brainspace

1 company that they told us is where they get this from, and we
2 give them multiple opportunities to exclude documents.

3 So what did the Court do in the *Progressive Casualty*
4 *Insurance Company* case? The Court said, the only way you can
5 use TAR is with, and I'm quoting: "Unprecedented degrees of
6 transparency and cooperation among counsel in the review and
7 production of ESI responsive to discovery requests." And the
8 Courts have required the producing parties to provide the
9 requesting parties with full disclosure as to everything.

10 Now, they don't want to do that here. They wouldn't
11 tell us the definition of responsive and then it got worse
12 from there.

13 So now put this distraction on the plaintiffs at
14 literally the last minute would be enormously and
15 catastrophically prejudicial to what we're doing. We don't
16 have a quiet time now. We're going to get hit with all the
17 documents and now what we're going to have to do is we're
18 going to have to be able to come back to the Court to show you
19 all of the gaps in their productions and how they didn't
20 prioritize.

21 But I didn't hear one defendant actually tell us that
22 all the chromatography has been produced today. I mean, if
23 they haven't all produced their chromatograms and their mass
24 spectrometry, the key testing, then there's a serious problem
25 in this litigation, if they thought that that was going to be

1 accessible. We're going to be in front of the Court, there's
2 no doubt, based on the representations we've heard from
3 counsel.

4 So now, while we're dealing with that, we're about to
5 get hit on Friday with the motions to dismiss. So all of our
6 leadership, all of the people that are running the most
7 important critical decisionmaking are going to be dealing with
8 that. We, by the way, served the deposition protocol last
9 week for fact depositions on the defense. While all this is
10 going on, they want us to now engage in a meet and confer on
11 ESI for TAR that should have happened last year before the
12 search terms were put in place, and at the worst, should have
13 happened in January when they were supposed to have already
14 started looking at their documents.

15 Remember all the representations Your Honor got.
16 Those papers still exist when they said, hey, we're getting
17 too many hits, this is too many documents to review, we have
18 to narrow the search terms. They have to live by what they
19 told the Court and they have to live by the representations
20 they made and at some point, the buck has to stop and I think
21 today is the day, Your Honor. Now they have to actually live
22 with what they told the Court and what they represented and
23 they got judicial intervention on their behalf.

24 That sounds like judicial estoppel to me where they
25 said, we need to narrow these terms being we're doing a search

1 term review. To now come in with this other set of criteria,
2 and I mentioned this before, Your Honor, this doesn't only end
3 up with this reservoir of -- what we expect to be a massive
4 quantity of documents that they're never going to review, but
5 what it also does is changes how documents are prioritized for
6 production, it changes the flow.

7 And, Your Honor, we gave you very detailed
8 information in that letter. I think you can appreciate that
9 Mr. Jaffe spent a lot of time consulting with us and helping
10 us to write that letter to Your Honor so that we could lay out
11 for you in detail why it is that from a technical perspective,
12 their proposal, especially in the black box that they have
13 kept it in during our negotiations, would create so much
14 mischief and would change what we're going to get and when
15 we're going to get it. And, for example, Mr. Jaffe gave us
16 language that we put in that letter about some documents that
17 will have very few of the indicia that will lead to this
18 manual learning application, pulling those documents, which
19 will be some of the most important documents of litigation,
20 and the search term methodology we have in place guarantees us
21 that a good faith reviewer will look at that document and say,
22 you know what, that has to be produced. It's harmful, but,
23 you know, the way it's worded, maybe it only has one of the
24 search terms in it, but that's clearly relevant, you get it.

25 Their system puts it into the reservoir of we may not

1 need to review this document. It gives them tremendous
2 control over this, and again, TAR can never be imposed in that
3 way.

4 Now, I've spoken for a while. I want to just say one
5 other thing. The *Mercedes Benz* case, Your Honor, which is a
6 well-known case now and it's 2020, you know --

7 THE COURT: That's a funny case, because there, the
8 plaintiffs wanted to use TAR instead of the defendants.

9 MR. SLATER: Absolutely. And what did Judge
10 Cavanaugh say? Judge Cavanaugh said, "The defendants here
11 object," I'm on *2, "object to the use of TAR, instead
12 indicating they prefer to use the custodian and search term
13 approach which they assert is fair, efficient, and
14 well-established."

15 Now, this is 2020. This is the system that every
16 other defendant in this litigation has said they're using,
17 even Teva said it until recently that that was -- saw where
18 they were doing it and they called this archaic. So this is
19 2020. And what did Judge Cavanaugh say? He said, "However,
20 defendants are cautioned that the special master will not look
21 favorably on any future arguments related to burden of
22 discovery requests, specifically cost and proportionality when
23 defendants have chosen to utilize the custodian and search
24 term approach despite wide acceptance that TAR is cheaper,
25 more efficient, and superior to key word searching."

1 That language is critical. Your Honor, we put in the
2 provision in the ESI protocol that we were willing to talk
3 about putting a TAR provision in, because plaintiffs like it
4 if it's done the right way, if it's going to be negotiated
5 fully, fairly implemented with input from both sides. And
6 I'll point Your Honor to a case I cited -- we cited in our
7 letter, the *Actos* MDL, a litigation like this one. And what
8 did the Court say about *Actos* in the -- another case that the
9 defense cited, *Rio Tinto* that Teva cited where it quotes right
10 from *Actos* that the reason that worked there at *Actos* is
11 because the parties agreed to let their, quote unquote,
12 experts work together the whole time to run the TAR, to
13 validate the documents as they went, to relearn, reteach. So
14 both sides did it together from the beginning.

15 That's what we would have agreed to here and we think
16 that's what would have been ordered because it would have been
17 the only transparent way to run it here, but they didn't want
18 to do that.

19 So if you take what Judge Cavanaugh said, who was
20 acting as a special master in the *Mercedes* litigation, he said
21 you can't do what they're doing right here. You can't come
22 back and redo it, and that's what the Judge in the *Progressive*
23 *Casualty Insurance Company* case said.

24 Let's look at what they said in their letters to us
25 and their letter to the Court. They said, it's going to cost

1 us six million bucks and 40 months or whatever they said in
2 there. And what did the Judge say in Nevada? He said, that's
3 fine, produce everything, every document hit by the search
4 terms. You want a filter for privilege, go ahead. You want a
5 clawback, you can have it. Just produce them all. The
6 plaintiffs are willing to look at them. And I'll tell you
7 right now, Your Honor, the plaintiffs in this litigation are
8 willing to accept every document hit with a search term, we'll
9 deal with the burden of going through for responsiveness,
10 we'll search it on our own, we have a lot of people on our
11 steering committee, and that was the outcome that Court
12 ordered because the Court said it's too late, you're not going
13 to put this on the plaintiffs at this point in the litigation.

14 So we believe that this is really, you know, a Battle
15 of the Bulge kind of moment, especially where you have
16 Mr. Greene just casually mentioning to the Court and, hey,
17 let's see if any of the other defendants want to sign on to
18 this. I mean, the documents are rolling out today, Judge. We
19 were looking. We got 1620 documents from Mylan today. We got
20 70 pages from Teva. We have ZHP who has just told you that
21 they are producing some documents but took that one line from
22 your order to think, well, we hadn't collected documents.

23 I'm going to remind you, Your Honor, ZHP told us
24 during the search term arguments that they had collected
25 documents. They're on both sides of this. They keep going

1 back and forth with that, and by the way, they knew in
2 December what documents to get. Coronavirus didn't hit that
3 Wuhan Province until late January. So what were they doing
4 for that month-and-a-half? And by the way, they've also
5 admitted they collected documents for the US entity Solco
6 throughout. Where are all those documents? There should be
7 massive document productions happening today based on the
8 order from Your Honor. We're not going to get it.

9 I can tell you that this is going to be nothing but a
10 blood and guts fight from this point. I've seen it before,
11 and that's what's happening, and this is a Hail Mary by Teva
12 and then trying to give the other defendants the chance to
13 jump in.

14 This is like when Mylan led the charge on the search
15 terms and then when all the other defendants had to, you know,
16 they just jumped on the bandwagon said, all right, we'll take
17 a shot, and then what happened when that argument fell apart?
18 They all said, yeah, I guess we can live with much better --
19 with different terms. That's what's happening again.

20 And I apologize for talking this lengthy, but I was
21 biting my tongue through that argument from Mr. Greene. It
22 was very frustrating. We feel like there's a real serious
23 moment here in this litigation where we can move things
24 forward the way Your Honor expects them to or we're going to
25 bog down for trench warfare, and that's what's going to

1 happen.

2 Now Mr. Parekh and Mr. Jaffe are on. If I missed an
3 important technical point, I'll certainly leave it to them to
4 put that in, but I think that I've covered the major points of
5 our argument.

6 THE COURT: Can I ask you a question -- two questions
7 I have immediately come to mind, Counsel.

8 MR. SLATER: Sure.

9 THE COURT: One is, if the defendant Teva does not
10 use this TAR program, hypothetically. I know the plaintiffs'
11 preference is for them to produce every document with a hit.
12 But in the real world, Teva is probably going to do what
13 everybody else does in my hypothetical -- well, let's take a
14 hypothetical of a million documents, 200,000 hits, is it
15 plaintiffs -- is the inevitable result if TAR is rejected,
16 that Teva has to review those 200,000 documents by hand?

17 MR. SLATER: Well, remember, Judge, their review, for
18 relevance and privilege is their choice. Nobody is forcing
19 them to do it, and again, *Progressive Casualty Insurance*
20 *Company* case ordered the hit documents to be produced because
21 the Court there said, you know, this is the end of the line,
22 you're not getting a do-over to redo this from scratch. So if
23 they choose to do it, they can spend the time and money, which
24 they committed to do when they came before Your Honor a few
25 months ago and said those search terms are too broad, we need

1 to narrow them because that's exactly what we're going to do.

2 They represented to this Court that that's what they
3 were going to do. If they now -- and remember, Your Honor, I
4 have the transcript from November 30, 2019, when I was
5 imploring you and the defendant in saying, they haven't even
6 tested yet, they're refusing to test. And that's -- this has
7 been going on for close to a year now. And now after they
8 made all these representations to the Court that they were
9 going to do that and they needed to narrow the search terms,
10 now they say, well, we don't want to do it, it's too
11 expensive, we want to change our entire process.

12 You know, if they want to use TAR, I guess we'd have
13 to stop their production for the next few months, negotiate a
14 protocol and then we want them to run TAR on all of their
15 documents, not just the ones that got hit with the search
16 terms, because what they're not telling you is, with your
17 example of the thousand documents, 500 get hit and 500 don't
18 get hit, TAR might have picked up another 50 or a hundred or
19 more of the 500 that didn't get hit with the search terms
20 because it's such a better process.

21 And again, I'm telling you, we would have been happy
22 to do that with them but none of the defendants wanted to do
23 it and we knew about the other case law, we know we couldn't
24 force them to do TAR for the production, so we didn't try to
25 force them to do it. Now they want to put it on us at the end

1 without our input.

2 So I apologize for the long answer, but they don't
3 need to do that. They can give us all the documents. That's
4 their choice because they represented to the Court that's what
5 they were going to do.

6 THE COURT: I thought I heard Mr. Greene say that --
7 I know you said that they weren't responsive to your questions
8 in the last week or two, but I heard Mr. Greene say that they
9 want to sit down and meet and confer with plaintiffs and hash
10 out an acceptable, in their words, validation program. What's
11 wrong with that?

12 MR. SLATER: Well, you know, I saw Josey Wales the
13 other day. Remember the snake oil salesman, the carpetbagger
14 on the barge? That's what I'm thinking of right now. This is
15 legal snake oil. That's what this is. It's litigation snake
16 oil, because what they're saying is, we know that we're beat
17 on the law, so when they met with us on the telephone, I'm
18 telling you, Judge, we asked the most basic questions and it
19 was not just me, it was Mr. Parekh and Mr. Jaffe and we
20 couldn't get answers. All we got is, we're going to send you
21 the white papers. You saw those white papers, Your Honor,
22 they're marketing pieces.

23 The only thing that's really important there is, A,
24 the way that this system is supposed to be run, it's supposed
25 to have multiple tags, so it's run more efficiently, and you

1 have that in our letter. That's what the document says. It's
2 on Page 6 of the first white paper. Multiple tagging. They
3 don't want to do that. They want to have one tag because they
4 don't want to run the system at the most efficient level.
5 They're using this to hide documents from us.

6 So they wouldn't give us -- they wouldn't tell us how
7 do you define "responsive." Couldn't get that information.
8 That's going to be our -- that's our work product. Our
9 lawyers are going to know what to look for, they're going to
10 do it, they're going to train the system, you have no input
11 into it.

12 So they've already made that clear. Now they're
13 saying, well, maybe we need to give something up to keep the
14 Judge engaged, but all they're talking about is at the end of
15 the process, they'll talk about a protocol to do sampling of
16 -- I don't know how many documents or pages of documents
17 they're going to push out that we're supposedly never going to
18 see. I mean, so the answer is, it's snake oil. It's
19 something that we should not even have to deal.

20 This distraction at this point is massive. The fact
21 that we're even spending the time -- I've spent probably 20
22 hours on this in the last couple weeks between reading case
23 law, writing things, meeting on the phone with Mr. Jaffe and
24 Mr. Parekh, going through this. We have spent an enormous
25 amount of time that we should have been spending on other

1 things because this should have been done so long ago.

2 So as those cases say, as *Mercedes Benz* says, as
3 *Progressive* says, these are their own cases. You cannot foist
4 this on the plaintiffs at the end of the process when now the
5 documents are coming out and you don't like what you're
6 seeing, and that's what we think is going on. We think they
7 started looking at the documents that were hit and were
8 relevant and they said, wow, this is a problem, we need a way
9 to start to bury some documents and this is a way to do it.
10 And I have no doubt at this point the level of cynicism I have
11 with this process and with some of the answers the Court has
12 heard today from the defense. What else am I supposed to
13 think? That's what experience tells me.

14 And we don't want to have to go through this process,
15 frankly, Your Honor. We don't need this distraction of
16 dealing with them on this proposal at this point. We don't
17 need to be spending time. We need to focus on the documents
18 that are hitting our system right now. We need to start
19 reviewing them and making decisions on what to put before the
20 Court in order to figure out, did they prioritize, did they
21 not, what's missing, do we have attachments being threaded
22 properly. Mr. Parekh needs to focus on did they e-mail thread
23 properly or did they not. Did they de-duplicate properly.
24 What are we seeing in terms of the trending. All the types of
25 analysis we need to do. We don't need this distraction. It's

1 completely inequitable for them to dump this on us at this
2 point.

3 MR. PAREKH: Your Honor, this is Behram Parekh, can I
4 just interject for one moment if that's all right?

5 THE COURT: Of course.

6 MR. PAREKH: In answer to your question, and more
7 specifically, the problem is that, one, had we known TAR was
8 being implemented, when they came back to us, we had this
9 process in January through the last conference, we would not
10 have made the modifications, the search terms that we would
11 have done and, in fact, we would have expanded the search
12 terms or not used search terms at all.

13 The validation process that they talk about, I'll try
14 to hammer out in the next couple of weeks, is essentially
15 intended from a technical level to give parties confidence
16 that, you know, yeah, you're only missing 5 percent of the
17 documents, you're only missing 7 percent of the documents.
18 That's great if you're starting from the entire universe of
19 documents. If I agree to search terms, we made all of these
20 concessions, we already know we're missing 7 percent,
21 10 percent, 15 percent of the documents.

22 So now what defendants want us to do is agree to list
23 an even larger percentage of documents on the stuff that hits
24 on the search terms. That's why layering this process on top
25 of the search terms is inequitable to plaintiffs and why we

1 shouldn't have to go back and agree to some other form of
2 protocol.

3 THE COURT: Question for you: If this issue had been
4 raised early in the process, before we spent so much time
5 working on the search term issue, would there be so much of a
6 vociferous objection? So what I'm trying to get at is, is the
7 essence of this dispute that there is an inherent distrust of
8 this sort of TAR program, or is it, Judge, we're too far down
9 the line, we've invested too much time and energy to go
10 backwards and we have other issues to devote our energies and
11 time to, other than working on a search term issue that we
12 already resolved. Which one is it?

13 MR. PAREKH: It's actually -- there's no inherent
14 distrust with TAR as a concept, but when you use TAR on top of
15 search terms, what you do is you compound by an order -- an
16 exponential level the magnitude of the error. The search
17 terms are going to list a set of documents. All of the
18 parties understand that, which is why you negotiate search
19 terms so heavily. TAR is going to list a certain percentage
20 of the document. All of the parties know that, which is why
21 you negotiate TAR the way that you do, and you get metrics and
22 levels.

23 When you combine the two, when you say, okay, now
24 that we've finished negotiating the search terms, now we want
25 to negotiate TAR, what you're saying is, hey, out of that

1 15 percent that you've missed, we're now going to add another
2 15 percent or 7 percent or whatever the confidence level you
3 are at of documents that we're going to miss. That gives
4 plaintiffs 30 percent of documents that are somehow not being
5 looked at and not being produced. That's the objection. It
6 should be one or the other. It can't be both.

7 THE COURT: Question: If we --

8 MR. SLATER: It is both -- I'm sorry, Your Honor --
9 and the time and effort we've put into the search terms.

10 THE COURT: If we go back to square one, right at the
11 beginning, before we invested all the time and energy of
12 search terms and Teva had said, we're going to use TAR,
13 plaintiff says okay, we're going to meet and confer. If a TAR
14 program is used, do you still have to identify the custodial
15 searches that have to be done, or it sounds impractical to
16 say, every single person who works for Teva, their documents
17 are going to be searched, this TAR program.

18 In other words, when you use the TAR, do you still
19 have to identify the custodian you use, even though you may
20 have narrowed it down by search terms?

21 MR. SLATER: No, you would search the selected
22 custodians.

23 MR. PAREKH: I'm sorry, Your Honor, this is Behram
24 Parekh. You would still have to identify the custodians
25 because otherwise, you're searching an insane magnitude of

1 documents. But in using TAR, the leverage of TAR, what it
2 allows you to be is be broader in terms of the documents that
3 you select and potentially the number of custodians you
4 select, although, you know, that -- you'd have to draw a fine
5 line as to whether or not we would have asked for more
6 custodians or not at this point.

7 THE COURT: All right.

8 MR. GREENE: Your Honor, this is Jeff Greene. If I
9 may just respond for a minute and I promise to keep it brief.

10 THE COURT: Can I ask you a question or two,
11 Mr. Greene?

12 MR. GREENE: Of course.

13 THE COURT: The record reflects that the first time
14 Teva brought this issue of TAR up with plaintiff was July 1.

15 When did Teva decide to use the TAR program and was
16 this issue contemplated even back in December, when the Court
17 had entered its first order regarding the search terms.

18 MS. LOCKARD: Your Honor, this is Victoria Lockard.
19 You know, Mr. Greene was brought in recently because of the
20 TAR issue, so I'm going to jump in on the historical piece of
21 this. TAR was brought up and discussed even before last
22 November and December. It's expressly set out in the ESI
23 protocol which allows --

24 THE COURT: Right.

25 MS. LOCKARD: -- search terms and TAR. We were

1 talking about this in April of 2019 when we were negotiating
2 the protocol. The protocol says, if we decide to use it, want
3 to use it to eliminate documents, we'll have the discussion in
4 the meet and confer. That's what we tried to do when we
5 decided to use it. In the interim, in November, when the
6 parties had their meet and confer in person, conference,
7 plaintiffs asked defendant, do you intend to use TAR. We've
8 all reserved our right to use TAR during those conferences.
9 The other defendants did. I haven't heard any defendant yet
10 have an opportunity to speak, you know, we're not here to
11 speak for them, they can do so themselves, but I've seen
12 nothing on the record that suggests that any of them have
13 confirmed to plaintiff that they have no intention to ever use
14 any sort of CMML or TAR process.

15 So the fiction that this was just invented in the
16 last few weeks is just not correct, it's not reflected by the
17 record.

18 Secondly, to the point about, well, we never would
19 have negotiated the search terms, we went to the Court and --
20 all this about, well, estoppel of the Court's ruling, the
21 Court denied our request to modify the search terms. We had a
22 concern with the breadth of the search terms. We brought it
23 before the Court. The Court denied it. The Court said the
24 parties can work it out. The parties got together, we got
25 some minor concessions from plaintiffs' counsel on some of

1 these search terms, but I can tell you it made a small dent.

2 When we looked back, we ran all of the searches under
3 the new revised lightly modified search terms, we're still
4 looking at Teva. The last number I saw was something on the
5 order of, you know, close to 4 million documents. To expect
6 us to put eyeballs on all of those, you know, in the timeframe
7 that was provided was not reasonable. That's when we started
8 looking at this TAR. I'm not an expert on it. We brought in
9 Mr. Greene at that point. This has all happened in the last
10 month.

11 We got our experts on it, we talked to our ESI vendor
12 about it and we disclosed it, you know, before we even had to,
13 to Mr. Slater and to Mr. Parekh. We said, look, we're not
14 using this to set aside or hide documents, we said we're going
15 to use this to help get to the documents we need to get to so
16 we can make our deadline and they still objected.

17 So I just wanted to speak to that history and I'll
18 turn it back over to Mr. Greene and I apologize for jumping in
19 there.

20 THE COURT: I do have a point. Hold on one second,
21 Ms. Lockard. I have the ESI protocol in front of me now.

22 In Section 2 of the protocol, you're correct. It
23 mentioned the TAR predictive coding. It says: "The parties
24 will cooperate in good faith," blah, blah, blah, blah, blah,
25 blah, "prior to using TAR."

1 Then it says: "The parties agree to meet and confer,
2 quote unquote, as early as possible to discuss search
3 methodology, including TAR." Okay? That's what the -- that's
4 what the order said. It's undisputed that the first time this
5 issue was brought to plaintiffs' attention was July 1. Why
6 wasn't it brought to plaintiffs' attention earlier?

7 MS. LOCKARD: The ESI protocol says that search terms
8 and protocols and any TAR/predictive coding will be discussed
9 -- disclosed prior to using any such technology to narrow the
10 pool of collected documents to -- as set under their review.

11 I just want to make sure that the record is clear on
12 that, that that provision requires us to do that prior to
13 narrowing the pool, which we're not doing or -- which we
14 haven't done to date. And by the way, that's what we told
15 plaintiffs' counsel we had not done to date on our phone call.

16 In terms of why we didn't bring it to their attention
17 before July 1st is because it wasn't until the end of June
18 that we knew we would use this in order to prioritize the most
19 relevant and pertinent documents for this review process. It
20 was offered to us by our vendor that -- when we are struggling
21 with the sheer volume of the documents, it was offered as a
22 tool, just an additional tool to facilitate the review.

23 THE COURT: Okay. So --

24 MR. GREENE: Your Honor, this is Mr. Greene, if I
25 could just make a quick couple of points here.

1 THE COURT: Go ahead, Mr. Greene.

2 MR. GREENE: And I promise I'll keep it brief. You
3 know, there are -- I think Mr. Slater's inexperience with TAR
4 is telling, because he's unable to distinguish cases, you
5 know, cases that were TAR 1.0 versus 2.0, for example. The
6 *Progressive* case is -- he can cite to that but, you know,
7 there was no continuous learning, that was a TAR 1.0 case so
8 the process was very different. There was no ESI -- there was
9 no TAR reference or predictive coding reference in the ESI
10 protocol in that case, and I think that's significant because
11 we do have one in this case, and then I think more
12 importantly, and Mr. Slater can insult me as much as he wants,
13 he does not know me, I've been doing this a long time and he
14 can call me a snake oil salesman, but the reality is, in that
15 case, *Progressive* was unwilling to engage and be transparent,
16 whereas we are and they've just said no.

17 What we heard, Your Honor, was words from Mr. Slater
18 like "mischief" and "insidious" and "grand conspiracy." We
19 heard lots of histrionics, but the fact is, he cannot fight
20 the presumption, the black letter law that says we get to
21 chose the review and the search and review methodology, that
22 is beyond doubt, and whether it's *Mercedes Benz*, whether it's
23 *Hyles versus New York City*, 2016 Westlaw 4077114 -- *Hyles*,
24 *H-Y-L-E-S*, versus New York City. The *Rio Tinto* case again,
25 that was a 1.0 decision, a TAR 1.0 decision where there were

1 seed sets and it made sense for the parties to work together
2 on those seed sets. With a Continuous Active Learning
3 process, we're just reviewing documents and there's no reason
4 for us to be sitting side by side.

5 I think a fundamental premise that we have here is
6 that, you know, the plaintiffs are -- they're spending a lot
7 of time making up numbers. We heard 15 percent, we heard
8 20 percent, we heard 7 percent, and were reducing the sets,
9 but they have no support for that, and at the end of the day,
10 you know, they cannot possibly dispute that a
11 technology-assisted review process is going to be more
12 reliable and more accurate than a linear review.

13 And the same decision that they want to see as part
14 of a TAR exercise, they don't get to see in terms of a linear
15 review. So if I have a review attorney, if one of my
16 associates is reviewing a document and they make a decision on
17 what relevance is and Mr. Slater can say that we never gave
18 him the definition of relevance, which we did, so that's
19 false. We said that, you know, the definition, Rule 26 should
20 give us a boundary and that should be the claims and defenses,
21 documents or information relating to the claims and defenses.
22 And if I have an attorney looking at that document, they make
23 a decision, does this document relate to the claims and
24 defenses of that case.

25 And I suppose another set of guideposts would be the

1 documents that -- the document request that we received.
2 Though it is a multi-layered analysis, we look at it from the
3 perspective of claims and defenses and we look at it
4 specifically with respect to the document request. There's no
5 grand conspiracy here, Your Honor. I mean, we're sort of
6 stunned that plaintiffs have taken this position and they've
7 reacted in this way because, you know, they're saying that we
8 want to bury documents. They have no support for that.

9 They say that, you know, we don't like what we're
10 seeing so we're suddenly engaging in a TAR process. They have
11 no support for that, and Mr. Slater can engage in whatever
12 histrionic he prefers, but the fact is, they have no proof for
13 any of the statements they're making.

14 At the end of the day, we're happy to engage in a
15 transparent process but they're afraid to do so and, Your
16 Honor, when you asked Mr. Slater the very pointed question,
17 what's wrong with sitting down and meeting with them, he
18 couldn't give you an answer, and I'll stop there, Your Honor.

19 THE COURT: Mr. Greene, I have two questions of you.
20 One, did you report to any -- can you cite me to any recorded
21 case that talks about TAR 2.0? Do you have experience using
22 TAR 2.0 in other cases, especially MDL cases? That's one.

23 And, two, if it's so burdensome to put eyeballs on
24 all of the responsive documents, why aren't the other
25 defendants complaining that they also want to use TAR? And

1 it's like silence. I'm taking that as an implicit
2 acknowledgement that they're going to put on -- put eyeballs
3 on their hit documents -- well, their internal, quote unquote,
4 hit documents, I don't think --

5 MR. GREENE: I can answer that, Your Honor.

6 THE COURT: I don't think that the burden -- how do I
7 say this? What I'm trying to say is with regard to the number
8 of hits, I don't think they're going to be disproportionately
9 larger for Teva than it is for some of the other defendants.

10 So why aren't they complaining about a burden, and
11 Teva says they have to use TAR.

12 MR. FERRETTI: Your Honor, this is Joe Ferretti on
13 behalf of the ZHP defendants. I acknowledge that it may be an
14 appropriate time for me to speak up in light of your comments.

15 The ZHP defendants aren't planning to use CAL in the
16 same way that Teva is proposing. However, we are intending at
17 some point to use it. Right now, we're simply doing a linear
18 review of the custodians who the plaintiff has asked us to
19 prioritize, and at some point very soon after all of our data
20 is processed and de-duplicated and finally in -- 100 percent
21 in the system, we will be flipping on the switch for
22 Continuous Active Learning.

23 I don't view Continuous Active Learning as being the
24 same thing as what the ESI protocol is referring to. That
25 refers to TAR/predictive coding. We're not intending to do

1 any predictive coding. We're intending to use CAL in order to
2 prioritize the documents that are batched out for review for
3 our reviewers, so the CAL system will simply decide which
4 documents it thinks are most likely to be responsive and it
5 will immediately batch those out for review, and based on the
6 number of documents that we've reviewed so far in the system,
7 we expect it to be very good results early on. We expect
8 there to be some, you know, very good number of responsive
9 documents being front-loaded in our review and produced.

10 And at some point down the line, we expect there may
11 be a time where the responsiveness rate becomes just abysmally
12 low. As it is, the responsiveness rate that we are
13 encountering is somewhere in the neighborhood of 7 percent.
14 That is a very low responsiveness rate. So seven out of every
15 hundred documents we're finding that we're reviewing are
16 actually responsive to the document request and we expect that
17 at some point, it's going to be much, much lower because of
18 the use of CAL, and at that point we would approach with
19 plaintiffs and say, what do you want to do here, because we
20 have a very low responsiveness rate and at this point we
21 believe it's disproportional in terms of our level of effort
22 needed to review the remaining number of documents given the
23 one out of every thousand or one out of every 2,000 documents
24 we're finding to be responsive.

25 And at that point, we can talk to plaintiffs about

1 what measures to take, whether we need to shift costs for
2 plaintiffs to bear the cost going forward or whether we need
3 to narrow or focus in on certain things and let the others go.
4 That's the way I envision using it. It's a common way to use
5 it, as I understand it, and it shouldn't be -- come as any
6 surprise. It's not -- we're not using it in the way of -- in
7 the way of predictive coding or in the way of trying to rank
8 documents to -- exclude documents based on rank. We're hoping
9 to use it simply to determine when we've gotten through the
10 vast majority of what will be the responsive documents in the
11 set.

12 And so my hope is, Your Honor, that whatever comes of
13 today, we're not joining in any motion today, we're not a
14 party to any arguments, but what I'm hoping is that whatever
15 decision Your Honor makes today won't preclude our intention
16 -- or preclude us on behalf of the ZHP defendants from
17 applying that approach.

18 THE COURT: Thank you, Counsel.

19 MR. GREENE: Your Honor, to answer your question, I
20 think Question 2 just got answered taking them in reverse, you
21 know, as two, why isn't anyone else doing it, you know, why
22 aren't the other defendants. I can't speak to their datasets,
23 they may have a smaller number of custodians and, you know,
24 they may have different document retention policies in place
25 related to e-mail and so on, so there are any number of

1 factors that could affect the number of hits that are -- the
2 number of documents that an individual custodian has. So I
3 don't think it's, you know, comparing one defendant to another
4 is an apples-to-apples comparison.

5 I think your first question was, do I personally have
6 any experience with CMML. Yes, I've been doing this for quite
7 some time, so the answer to that is yes.

8 Do I have experience in CMML in an MDL setting, the
9 answer to that would be no, but I know Consilio our vendor
10 does, but I'm not sure -- I think that's a little bit of a
11 distinction without a difference in terms of -- a complicated
12 case is a complicated case.

13 You use these -- typically, you use
14 technology-assisted review, this CAL exercise, which we're
15 really talking about in the context of a case with a large
16 volume of record, and those are typically larger cases with
17 larger, you know, with larger dollar values at stake. So I'm
18 not sure the MDL -- except the fact this is an MDL is an
19 issue, at the end of the day, it's really more the size of the
20 case and the number of documents that you are dealing with.

21 MS. LOCKARD: If I can just add one additional point
22 to the questions on the table. Again, Victoria Lockard.

23 Just to remind the group and Your Honor, you know,
24 when we discussed the progress of the parties with their
25 discovery responses back in April and the Court entered the

1 order about the July 15th date being set in stone. You may
2 remember we discussed -- many of the defendants had been
3 focusing their efforts on noncustodial documents because for
4 whatever reason, those were -- you know, that was their focus,
5 that's what they went after, and we disclosed at that point
6 that we, Teva, had already loaded a number of custodians up on
7 our vendor's platform. I believe we were the only defendant
8 who had done that at that time and others were focusing on
9 noncustodial pieces. So that's not to compare apples to
10 oranges there.

11 But the point being, we focused our efforts as we
12 rightly were entitled to do so, on the custodial piece and
13 that's why we're out ahead on this issue. It's not because we
14 stand, you know, out of alignment with anyone, it's because
15 we're first in the line in terms of getting the most
16 custodians loaded on our vendor's platform.

17 THE COURT: Okay.

18 MR. STOY: And, Your Honor, if I may, to piggyback on
19 that point. This is Frank Stoy, S-T-O-Y, on behalf of the
20 Mylan defendants. I think that we are also considering the
21 use of a TAR 2.0 Continuous Active Learning tool for our
22 custodial document review.

23 As Ms. Lockard just alluded to, the documents that we
24 produced to plaintiffs today were noncustodial, but whether we
25 ultimately take an approach similar to that which Mr. Greene

1 has described or that which Mr. Ferretti talked about for ZHP,
2 we haven't yet determined, but we are analyzing those options.

3 THE COURT: Okay.

4 MR. SLATER: Your Honor, it's Adam Slater. I'm
5 sorry, just very briefly.

6 THE COURT: Go ahead.

7 MR. SLATER: So now you see the virus spreading and
8 that's what's happening. I mean, that's what's happening. I
9 would love to see the e-mails between these various attorneys
10 where they're saying, well, take a shot, that's why we're
11 salesmen, we want to be able to have the opening to do this
12 too, now.

13 You asked a question and you won't find an answer to
14 the question of, is there a TAR 2.0 case. Counsel didn't
15 identify one, and he's certainly not going to identify one
16 where it was ordered to be used in conjunction with search
17 terms, because it's not done that way. So they didn't want to
18 do TAR because they knew that if they did it -- remember,
19 Mr. Greene is a member of the Greenberg Traurig firm. He's
20 been there the whole time, presumably he's known the whole
21 time how clunky and terrible search terms is as an approach,
22 so why did they want to agree to that, because they didn't
23 want to have TAR run the way it's supposed to be which is with
24 a full process of vetting with involvement like an Actos where
25 both sides actively review the documents together and

1 determine responsiveness together against all of the document
2 sets for all of the custodians. They didn't want to do that.

3 Now they're taking the shot. It's obvious why
4 everybody is jumping on the bandwagon now, Your Honor. We
5 implore you -- you know, we just heard ZHP say 7 percent of
6 the documents are responsive. We're going to have big battles
7 to fight about why so many documents are being held back, if
8 they're going to try to tell us that there's 93 percent of --
9 documents hit with search terms are not actually going to be
10 produced. So we ask you, Your Honor, to just put to this bed
11 today. They can't do this. This is going to be a fight that
12 is going to take over this litigation, and there's no way
13 around it. There's no way to introduce TAR in a meaningful
14 and fair way this late in the litigation.

15 THE COURT: Okay. Counsel, we've been at this a long
16 time and I still think my initial reaction was correct, that
17 I'm not prepared to make a ruling on this issue today, but, I
18 do think it's appropriate to issue in effect a, quote unquote,
19 stay order that, and it doesn't sound, from what I understand
20 Mr. Greene to say, that we've reached the point in the review
21 where any documents are being excluded. We haven't reached
22 that point yet, so in effect, I think it's appropriate to have
23 a standstill and I'll somehow wordsmith this to say that.

24 You can continue with your TAR and all your reviews
25 and that, but until the Court rules on this issue, no party

1 can exclude any documents from review because of the TAR
2 program until the Court rules on this issue.

3 I think the parties' briefs were extremely
4 comprehensive. Oral argument certainly was. I don't know,
5 does anyone think there's anything to add to the record on
6 this issue that they want to add before the Court digests this
7 and rules on it?

8 MR. PAREKH: Your Honor, this is Behram Parekh. At
9 the risk of saying yes, I do -- would like to add two items.

10 THE COURT: Okay. If anybody wants to add anything
11 to the record on this, can you just submit it in a week?

12 MR. PAREKH: Your Honor, this is just really brief
13 and it's in response to your point that they can continue to
14 use Continuous Active Learning for prioritization, and the
15 points that I would just make are -- and I'll keep them brief.

16 The first is when TAR -- when Continuous Active
17 Learning is used for prioritization, what it does is, the way
18 the system works is, as it's trained by people selecting
19 things that are relevant and not relevant, what it does is, it
20 prioritizes the most commonly hit relevant documents.

21 So what it means to the end are usually short
22 documents that tend to be relatively, you know, short e-mails
23 and -- but those may be incredibly relevant.

24 What it also does, the way I understand Greenberg
25 Traurig to be using it and the way I understand other

1 defendants to be using it, it's run across the entire spectrum
2 of custodians and therefore, as we get closer to doing
3 depositions, plaintiffs will never know if any particular
4 custodial documents are complete, because the way the TAR
5 system works is, it doesn't care which custodian is being
6 produced, it runs them across them and it says these are the
7 documents that I think are hitting the most from what people
8 are saying, this is relevant. And so it makes it much more
9 difficult for us to start taking depositions because we will
10 not have complete custodial files until the very end of all
11 production. I just wanted to bring those two items to your
12 attention, Your Honor.

13 THE COURT: But do you agree with me that if the
14 Court enters this standstill order, that no documents are to
15 be removed from review pursuant to this program until the
16 Court rules on this issue, plaintiff is not going to be
17 prejudiced. Do you agree with that or disagree with that?

18 MR. PAREKH: I do, Your Honor. I just wanted to make
19 the point that the standstill just preserves it for this
20 particular instance and we could still face prejudice if it
21 continues to be used going forward.

22 THE COURT: You believe, you and Mr. Slater have said
23 it very well, you believe the plaintiffs will be prejudiced if
24 the Court permits the defendants to remove from review
25 documents using a TAR program.

1 The Court's order is going to say you can't do that
2 until the Court rules on this issue. I don't know how I'm
3 going to rule on this issue, so I'm -- I'm just trying to give
4 some comfort to the plaintiffs that defendants can continue to
5 do what they're doing, but they're not going to remove any
6 documents from review until at least the Court rules on the
7 issue.

8 That's the Court's intent.

9 MR. PAREKH: Your Honor, I understand that Your Honor
10 might. My only point was that it will end up prejudicing our
11 ability to take complete depositions at some point in the
12 future if it's allowed to continue with -- the way it looks
13 like Greenberg and other firms are implementing this, because
14 we will not be assured of complete custodial productions.

15 THE COURT: Well, isn't the production going to be
16 done in November? Isn't that the outside date? So you're
17 going to get everything by November, right?

18 MR. PAREKH: At that point, then I think we have no
19 issue.

20 MR. SLATER: Let me just interject, Your Honor, it's
21 Adam Slater. The issue is this, we have to deal with the
22 briefing on the motions to dismiss. So if this methodology is
23 used, it's going to deprioritize critical documents that we
24 have prioritized. So we're not going to get them potentially
25 until after all the briefing is done on the motions to dismiss

1 where those documents could actually have a significant impact
2 on the briefing. We're asking -- we object to this completely
3 so they can't do it at all.

4 THE COURT: Mr. Slater, you know as well as I do that
5 they can't use discovery documents outside their pleadings for
6 the Rule 12 motions and neither can the plaintiffs, right? So
7 it's really irrelevant what the documents say, right?

8 MR. SLATER: I'm not sure about that, Your Honor. I
9 mean, they're going to -- but we don't know what they're going
10 to say in their motion. We think they're going to -- we don't
11 know how their arguments are going to be framed, but if we
12 have a document that shows that one of our claims is valid, I
13 think it would be -- it's potentially going to be presented.

14 I mean, there's obviously rules about when documents
15 outside the pleadings can be utilized and whether they're
16 quoted or whether they are incorporated by reference. I mean,
17 we know those cases, so I wouldn't want to foreclose that. I
18 think the data -- the defense has -- they're in a
19 straightjacket to a larger extent where they open the record
20 and turn this to a, quote unquote, summary judgment motion and
21 then the Court can then defer the whole thing until the end of
22 discovery, which is maybe where we'll end up procedurally on
23 some of this.

24 I mean, I can't presuppose everything, but we have
25 the right to get these documents to us -- produced in a

1 priority fashion as Your Honor ordered them to comply. We
2 were told, yeah, we're going to comply, and now this system
3 will change the way documents come out to us.

4 MS. LOCKARD: Your Honor, the motion to dismiss is
5 due in two days. I would submit that if there are documents
6 that Mr. Slater thinks he needs to respond to our motion to
7 dismiss outside of the four corners of the pleading, you know,
8 I think that will -- we can address that at a later time, but
9 I'm fairly confident that will not happen. We do not intend
10 to convert this to a motion for summary judgment.

11 THE COURT: That's what I'm assuming, but I guess
12 we'll have to see. We'll cross that bridge when we come to
13 it. But we all know the difference between a Rule 12 motion
14 is and a Rule 56 motion.

15 MR. GREENE: Your Honor, if I may, it's Mr. Greene,
16 Jeff Greene here, and I apologize for interrupting.

17 You offered to consider additional information, Your
18 Honor, and we're happy to put together a couple -- and some
19 case law because I think it seems that plaintiffs would have
20 you believe that it's either TAR or search term but not both,
21 and there are a number of cases, large cases, and I've cited
22 to the *In Re Boiler* -- *In Re Broiler Chicken* antitrust
23 litigation where that was -- specifically, there was a TAR
24 protocol entered in that case which specifically addressed,
25 you know, handled the search term TAR on top of search term

1 issue, so we're happy to provide the Court with that authority
2 to see, so that there's no concern from the Court's
3 perspective on our approach here by using searches -- by using
4 search terms in the first instance and then CAL on top of
5 that. So if we could have a few days to put that together,
6 we'd appreciate it.

7 THE COURT: My order is going to say, if anybody
8 wants to submit anything else, do it within a week.

9 So sort of to sum up where we are today, way back
10 when, we started with granting the downstream defendants'
11 request for extension of time. That will be confirmed in a
12 Court order, and then we talked about the individual
13 defendants' document production, and based upon what we heard,
14 I anticipate we're going to hear disputes about that.

15 And then the bulk of the time was spent on this TAR
16 issue where the Court is going to fashion an order to in
17 effect say, there's a standstill, and then one week to submit
18 due authority you want the Court to review and then the Court
19 will rule promptly, hopefully, on this issue.

20 In the meantime, given the Court's order which is
21 going to, in effect, have a standstill, defendants are not
22 prejudiced, they can do what they're doing, let the computer
23 learn, and plaintiffs are not prejudiced because right now,
24 until the Court rules, no documents are going to be excluded
25 from review.

1 So that's what we're going to do until the Court --
2 this is not a simple issue, there's equities on both sides and
3 the Court has to evaluate that.

4 All right, counsel, for the good of the order,
5 anything else we need to address?

6 MR. SLATER: No, Your Honor. Thank you.

7 RESPONSE: No, Your Honor, thank you.

8 THE COURT: Thank you, Counsel. We are now
9 adjourned.

10 (6:05 p.m.)

11 - - - - -

12

13 I certify that the foregoing is a correct transcript
14 from the record of proceedings in the above-entitled matter.

15

16 /s/ Karen Friedlander, CRR, RMR
17 Court Reporter/Transcriber

18 July 17, 2020
19 Date

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